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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 722

A. D. DYESS,

Petitioner,

vs.

H. J. MILLER.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND BRIEF IN SUPPORT THEREOF AND MOTION TO SUBSTITUTE.

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H. D. DRISCOLL,
A. D. DYESS,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner, A. D. Dyess, prays a writ of certiorari to review the judgment of the Supreme Court of Texas entered in this cause on March 19, 1941 (R. 165-173). A motion for rehearing (R. 174) and a motion to dismiss for lack of jurisdiction (R. 177) were filed April 3, 1941. Both motions were overruled May 21, 1941 (R. 193). A motion for rehearing of the motion to dismiss was filed June 5, 1941 (R. 197) and overruled July 9, 1941 (R. 221).

Statement.

This case involves the question of whether or not the Supreme Court of Texas may, consistently with the pro-

visions of the Fourteenth Amendment, exercise jurisdiction in a case where the writ of error has been prosecuted to said Supreme Court in the name of a deceased person, contrary to the statutes conferring jurisdiction on said Supreme Court.

The respondent, H. J. Miller, was the owner of 680 acres of land in Brazoria County, Texas, on December 10, 1928, when he conveyed said land to A. H. Edling, reserving a vendor's lien for the unpaid portion of the purchase price. Thereafter, on April 30, 1931, Edling conveyed the land to H. L. Middleton, Jr., in trust for his father, H. L. Middleton, Sr., who assumed payment of Edling's vendor's note to Miller. Subsequently on September 27, 1934, Middleton, Sr., conveyed to A. D. Dyess, petitioner herein, an undivided one-fourth oil and gas royalty interest in, on, and under the land in question (Opinion Ct. of Civil Appeals, R. 113; Opinion Supreme Court, R. 165, 166).

The deed from Middleton, Sr., to Dyess stated that Middleton was indebted to one Blackman in an amount secured by a deed of trust upon the said land; that Blackman was preparing to foreclose; that Middleton had employed Dyess "to bring such suit or suits in my behalf and in behalf of my son and trustee * * * as may be necessary to protect said property from foreclosure." The deed further stated that the employment of Dyess was on a contingent basis and that in consideration of services rendered and to be rendered by Dyess the grantor conveyed an undivided one-fourth interest in "oil, gas and other minerals in and under and that may be produced from said tract of land" to Dyess (Opinion Ct. of Civil Appeals, R. 114; Opinion Supreme Court, R. 166-167). The deed to Dyess was recorded on September 28, 1934, in Brazoria County Deed Records (Opinion Ct. of Civil Appeals, R. 115).

Pursuant to his contract of employment, Dyess on September 28, 1934, filed in the District Court of Brazoria

County, Texas, a petition on behalf of the Middletons against Blackman and one Abe Levy, Blackman's trustee under the deed of trust, whereby he asked for and obtained a temporary injunction restraining the foreclosure (Opinion Ct. of Civil Appeals, R. 115).

Thereafter, on February 9, 1935 Miller brought a foreclosure suit against H. L. Middleton, Jr., H. L. Middleton, Sr., and Joseph L. Poutra in the district court of Harris County to foreclose his vendor's lien note. Both the plaintiff, Miller, and his attorney had actual and constructive notice of Dyess' title but never made him a party to the foreclosure suit. (Opinion Ct. of Civil Appeals, R. 115).

After the filing of the said foreclosure suit, the said Dyess filed on behalf of Middleton a plea of privilege to be sued in the county of his residence, Matagorda County (Opinion Ct. of Civil Appeals, R. 115; Opinion Supreme Court, R. 168). The filing of the plea of privilege had no connection with the original contract of employment and was not contemplated by the parties at the time Dyess was employed by and received from Middleton the deed of conveyance (Opinion Ct. of Civil Appeals, R. 115-116, Testimony of Middleton Sr., R. 78).

Judgment was secured in the foreclosure suit by Miller, foreclosing the vendor's lien notes against H. L. Middleton Sr., H. L. Middleton Jr., and Joseph L. Poutra; and the land was sold by the sheriff of Brazoria County to H. J. Miller on June 4, 1935 (Pl. Ex. 7, R. 46). Thereafter Abe Levy, attorney for Miller, called on Dyess and stated that through an oversight he had not made Dyess a party defendant to the foreclosure suit and asked Dyess to execute and deliver a quit claim deed which Dyess refused to do. (Testimony of Levy, R. 90, 91).

Subsequently, on January 22, 1936, Miller by Levy as his attorney filed a suit in trespass to try title against A. D. Dyess in Brazoria County, Texas and it is to obtain a re-

view of the jurisdictional questions arising out of the judgments entered in this suit that this petition is filed. The District Court of Brazoria County, Texas on July 20, 1937 entered judgment decreeing that Miller, respondent herein, recover of Dyess, petitioner herein "the title and possession" of the land in question, (R. 17-19).

Petition for writ of error to the Court of Civil Appeals was duly filed by Dyess on November 4, 1937 and was allowed (R. 24) and on March 8, 1939 the Court of Civil Appeals entered its judgment reversing the District Court of Brazoria County, (R. 109) and on March 30, 1939 entered an order refusing a motion for rehearing (R. 119).

On April 20, 1939 Mrs. Martha Miller filed in the Court of Civil Appeals a Suggestion of Death wherein she stated that her husband H. J. Miller had died on September 10, 1938 which was after the writ of error was served and before the cause was decided by the Court of Civil Appeals. It was further stated that it was doubtful if it was necessary that she be substituted as a party but if so then it was accordingly prayed that the proper order be entered (R. 119-121). No order with reference to the Suggestion of Death was ever entered by the Court of Civil Appeals.

On April 25, 1939 an application for writ of error to the Supreme Court of Texas was made in the name of H. J. Miller (R. 121). The conclusion of said application reads as follows:

> "Plaintiff in error, H. J. Miller, prays that upon consideration of this petition writ of error be granted and that upon final hearing judgment of the Court of Civil Appeals be reversed and the judgment of the trial court be in all things affirmed and that judgment be entered herein in favor of plaintiff in error and that he recover all costs of court."

The petition is signed by "Robert L. Sonfield, Abe Levy, Attorneys for plaintiff in error, H. J. Miller" (R. 148-149). The application was granted on May 17, 1939 (R. 169) and

bond was filed on May 27, 1939, (R. 162-164). The Supreme Court of Texas on March 19, 1941 reversed the judgment of the Court of Civil Appeals and affirmed the judgment of the District Court of Brazoria County, (R. 173-174).

On April 3, 1941 Dyess, petitioner herein, filed a motion for rehearing and a motion to dismiss for want of jurisdiction, which clearly set forth the position of the petitioner that because of the death of H. J. Miller prior to the granting of the writ of error to the Supreme Court of Texas, that the Supreme Court was without jurisdiction to hear and decide the case because the writ of error was prosecuted in the name of a deceased person. The position which the petitioner advanced to sustain his contention in this respect was stated by the Supreme Court in its opinion overruling the motion to dismiss in the following words:

> "In the case at bar it is contended that the Court of Civil Appeals has exhausted its jurisdiction when it proceeded to final judgment under authority of Article 1850. We agree with such contention. Dyess then contended that Article 1760 cannot have any application to this case because H. J. Miller did not die after the jurisdiction of the Supreme Court had attached. We think there is no escape from sustaining such contention. H. J. Miller died while the case was still pending and wholly undecided in the Court of Civil Appeals. He did not die after the jurisdiction of the Supreme Court had attached" (R. 196).

Notwithstanding this direct holding that the petitioner herein was correct in his contention concerning the lack of jurisdiction of the Supreme Court of Texas that Court nevertheless retained jurisdiction and overruled the motion to dismiss on the ground that the application for writ of error should be read in conjunction with the suggestion of death and that when this was done it was apparent that the writ of error was prosecuted by Mrs. Martha Miller as independent executrix.

On June 5, 1941 the petitioner filed a motion for a rehearing of his motion to dismiss and in said motion in view of the arbitrary and capricious action of the Texas Supreme Court in retaining jurisdiction of the appeal after it had expressly ruled that by virtue of statutory provisions which were binding upon it, that it had no jurisdiction, the petitioner urged that the judgment deprived him of his property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States, (R. 200-201). The motion for rehearing the motion to dismiss was overruled by the Supreme Court on July 9, 1941.

Statutes.

The Revised Civil Statutes of Texas provide in part as follows:

> "Article 1760. If any party to the record in a cause pending in the Supreme Court dies after the writ of error has been served and before such cause has been decided by the Supreme Court, such cause shall not abate by such death; but the Court shall proceed to adjudicate such cause and render judgment therein as if all the parties thereto were living, and such judgment shall have the same force and effect as if rendered in the lifetime of all the parties thereto."
>
> "Article 1850. If any party to the record in a cause pending in a Court of Civil Appeals shall die after the appeal bond is filed and approved or after the writ of error has been served and before the cause has been decided, such cause shall not abate, but the Court shall proceed to adjudicate the case and render judgment therein as if all parties thereto were still living. Such judgment shall have the same force and effect as if rendered in the lifetime of all the parties thereto."

Questions Presented.

I. May a court retain jurisdiction of a writ of error after ruling that by its own construction of statutes limiting

its authority it had no jurisdiction because the writ of error was prosecuted in the name of a deceased person and without any substitution of heirs or legal representatives?

II. Does not such a retention of jurisdiction where its effect is to reverse a final judgment awarding title to property to defendant in error deprive defendant in error of his property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States?

Petitioner's Position.

Petitioner contends that upon the death of Miller the action abated as to him; that with the exception of entry of judgment by the Court of Civil Appeals the case could not be further prosecuted by Miller or anyone claiming under him until there had been a proper substitution of parties which substitution never was made; that the entry of final judgment by the Court of Civil Appeals exhausted that court's jurisdiction without reviving the case.

The Supreme Court of Texas never obtained jurisdiction of the case because of the fatal lack of a necessary party, the plaintiff in error. When the Supreme Court learned that the person in whose name the petition for the writ of error was filed was dead it should have in accordance with the great weight of authority, dismissed the writ for lack of jurisdiction, since there was never a necessary party before the court and consequently never any action before the court.

There can be no waiver, intentional or unintentional of lack of jurisdiction, therefore no action or failure to act on the part of the court, or the defendant in error conferred jurisdiction on the court.

In retaining jurisdiction after it had ruled, in accordance with the statutes of Texas which clearly limited its authority, that it had no jurisdiction the Supreme Court of Texas

acted in a manner entirely contrary to universal and long-established rules of law and therefore in an arbitrary and capricious manner.

By wrongfully retaining jurisdiction, the Supreme Court of Texas deprived petitioner of his property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States because the judgment of the Supreme Court reversed a final judgment of the Court of Civil Appeals which had conditionally awarded title to the property in question to the petitioner.

Reasons for Granting the Writ.

This case presents clearly a situation where there has been an arbitrary retention of jurisdiction by the Supreme Court of Texas although clearly under the applicable statutes, and its own interpretation thereof, it had no jurisdiction. The retention of jurisdiction results in depriving petitioner of his property which had been awarded to him by a previous final decision of a lower court.

The ruling presents, it is believed, substantial Federal questions which have been decided in a way contrary to principles set forth in applicable decisions of this Court *e. g.* among others *Stoll* v. *Gottieb,* 305 U. S. 165; *Exparte McCardle,* 7 Wall. 506; *Minneapolis and St. Louis R. R. Co.* v. *Peoria R. R. Co.,* 270 U. S. 580, 586; *Twining* v. *New Jersey,* 211 U. S. 78, 90; *Scott* v. *McNeal,* 154 U. S. 34, 46.

Wherefore it is respectfully requested that this petition for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case be granted.

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Of Counsel.